

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

OCT 30 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	FCC 02-201
	)	
Amendment of Section 73.202(b),	)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations	)	RM-9027
(Anniston and Ashland, AL, College Park,	)	RM-9268
Covington, and Milledgeville, Georgia)	)	RM-9384

To: The Commission

MOTION FOR LEAVE TO SUBMIT INFORMATION  
CONCERNING AN IMPROPER *EX PARTE* COMMUNICATION

PRESTON W. SMALL  
Timothy E. Welch, Esq.  
Hill and Welch  
1330 New Hampshire Ave., N.W. #113  
Washington, D.C. 20036  
(202) 775-0070  
(202) 775-9026 (FAX)  
welchlaw@earthlink.net

No. of Copies rec'd 014  
List ABCDE

October 30, 2002

Preston W. Small (Mr. Small), by his attorney, hereby seeks leave to submit information concerning WNNX LICO, Inc.'s counsel's improper *ex parte* submissions concerning the instant case to the Commission's professional staff who reasonably could be expected to be involved in the decision making in the instant case. In support whereof, the following is respectfully submitted:

1) A prohibited *ex parte* communication is one which is made to decision making Commission personnel which is directed to the "merits or outcome of a proceeding," but which is not served upon parties to the proceeding. 47 C.F.R. § 1.1202(a),(b),(c). 47 C.F.R. § 1.1208 provides that "proceedings involving amendments to the broadcast table of allotments," like the instant one, are "restricted" and *ex parte* communications are prohibited.

2) On October 18, 2002 the Commission released a *Public Notice* (Report No. 2380) indicating that counsel to WNNX, but for another client (Radio South, Inc.), had filed a petition for reconsideration in MM Docket No. 01-104. Counsel's petition for reconsideration was responding to the Commission's August 30, 2002 *Report and Order*, (DA 02-2063) which had dismissed counsel's petition for rulemaking because the proposal in MM Docket No. 01-104 was "contingent on the outcome of the Anniston and College Park proceeding, MM Docket No. 98-112 [the instant proceeding]" and because in MM Docket No. 98-112 "a further petition for reconsideration and second motion to open the record was filed on August 19, 2002."

3) Counsel filed the petition for reconsideration in MM Docket No. 01-104, without service upon the undersigned, on October 9, 2002. Neither undersigned counsel nor Mr. Small received a copy of October 9, 2002 reconsideration petition and our names do not appear on the attached service list. At pages 9-10 of the October 9, 2002 reconsideration petition counsel argues that "the filing of four petitions for reconsideration by Preston Small in the Anniston/College Park Proceeding

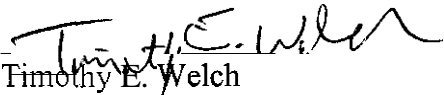
constitutes a very unique abuse of the FCC processes.” WNNX’s counsel further argues that “to allow the filing of a fourth petition for reconsideration to thwart the provision of first local service to four new communities disserves [sic] the public and essentially elevates and condones this sort of behavior.” In footnote 21 of the October 9, 2002 petition for reconsideration WNNX’s counsel argues that Mr. Small’s *Petition for Reconsideration* filed in the instant proceeding is “meritless” and that the Commission had changed its rules for the purpose of keeping Mr. Small’s “meritless” petition from being filed.

4) Counsel’s *ex parte* comments are clearly directed to the merits of Mr. Small’s *Petition*. First, counsel to WNNX asserts that Mr. Small’s filings are a “unique abuse of FCC processes.” Second, counsel to WNNX urges that the Commission not “condone[] this sort of behavior.” Third, counsel to WNNX explicitly states that Mr. Small’s *Petition* is meritless. It seems that in WNNX’s counsel’s zeal to deny Mr. Small reconsideration filing rights which every other party has and which many utilize, including Radio South, Inc., counsel forgot that he is not supposed to argue against Mr. Small’s pleadings in documents which are not served upon Mr. Small or his counsel. In an effort to paint Mr. Small in a bad light, WNNX’s counsel engages in behavior which is specifically prohibited by clear rule. Mr. Small has clearly explained his position at every stage of the instant proceeding. While counsel to WNNX apparently does not like the fact that Mr. Small is doing his best to protect his rights, counsel to WNNX has absolutely no right to try to argue the merits of the instant proceeding without serving Mr. Small with a copy of the pleading. The Commission should consider WNNX’s counsel’s October 9, 2002 petition for reconsideration to be a breach of the *ex parte* rules and consider that fact in reaching a decision in the instant proceeding.

WHEREFORE, in view of the information presented herein it is respectfully requested that the instant motion for leave to submit an errata be granted.

Hill & Welch  
1330 New Hampshire Ave., N.W. #113  
Washington, D.C. 20036  
(202) 775-0070  
(202) 775-9026 (FAX)  
welchlaw@earthlink.net  
October 30, 2002

Respectfully submitted,  
PRESTON W. SMALL

  
Timothy E. Welch  
His Attorney

Cox's Counterproposal, and Radio South's Counterproposal is arbitrary and capricious and cannot stand.<sup>19</sup>

**B. The Auburn Decision Is Inconsistent with Prior Precedent.**

**1. The Division Misapplied *Cut and Shoot*.**

In the Auburn Decision, the Division adopts a very wooden interpretation of *Cut and Shoot* and misapplies it to the facts. In *Cut and Shoot*, the proposed allotment of Channel 235A at Cut and Shoot, Texas was short-spaced to another station's licensed facilities but fully spaced to unbuilt facilities specified in a construction permit.<sup>20</sup> The petition for rulemaking proposing the Cut and Shoot allotment was returned because the proposed allotment was contingent on a third party constructing the permitted facilities. The policy behind the holding in *Cut and Shoot* is to prevent the filing of applications that are contingent upon the future construction and licensing of another station that, in fact, might never be built. In this case, however, WWFQ(FM)'s College Park facilities (serving the Atlanta market) were constructed and on the air and a license application had been filed more than six months before Cox and Radio South filed their counterproposals. The Division misapplied *Cut and Shoot* in dismissing Cox's and Radio South's Counterproposals as contingent when WWFQ(FM)'s facilities already were built and had been on the air for over a year. The policy underlying *Cut and Shoot* is not served by applying it to the facts and circumstances presented by Cox's Counterproposal and Radio South's Counterproposal.

By relying on *Cut and Shoot*, the Division failed to take into account the unusual circumstances presented herein. The filing of four petitions for reconsideration by Preston Small

---

<sup>19</sup> See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *Meinow Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

in the Anniston/College Park Proceeding constitutes a very unique abuse of FCC processes. Commission precedent should be flexible enough to deal with this unique situation and avoid inequitable results in tinrelated proceedings. Should the Division determine that **Cut and Shoot** is applicable, it should carve out a very narrow exception to **Cut and Shoot** in recognition of the unusual, special facts of this case where, but for an abuse of process in another rulemaking proceeding, Cox's and Radio South's Counterproposals faced no obstacles to grant. By creating such a narrow exception, the Division can ensure that its processes are not blind to the facts and equities of this case. To do otherwise and to allow the filing of a fourth petition for reconsideration to thwart the provision of first local service to four new communities disserves the public and essentially elevates and condones this sort of behavior,"

Moreover, by its actions, the Division has demonstrated that it itself does not believe that **Cut and Shoot** applies to these circumstances. As explained previously, the Division accepted ANI's Updated Petition, Cox's Counterproposal, and Radio South's Counterproposal even though they were contingent on the finality of the Anniston/College Park Proceeding. As discussed below in Section III.C., the Division also has granted other applications and issued a notice of proposed rulemaking for an allotment that do not protect the deleted Anniston allotment and are contingent on finality of the Anniston/College Park Proceeding.

---

<sup>20</sup> *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Cut and Shoot, Texas), Memorandum Opinion and Order*, 11 FCC Rcd 16383 (1996).

In fact, in deleting the rule provision that provided that the filing of a petition for reconsideration would automatically stay the effectiveness of a channel change order, the Commission's intent was to "remove an incentive for the filing of petitions for reconsideration that are largely without merit, thereby expediting the provision of expanded service to the public and conserving Commission resources now expended processing these meritless petitions." *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders, Report and Order*, 11 FCC Rcd 9501, ¶ 1 (Aug. 8, 1996).

## CERTIFICATE OF SERVICE

I hereby certify that I have this 30\* day of October 2002 served a copy of the foregoing *MOTIONFOR LEAVE TO SUBMIT INFORMATION CONCERNING AN IMPROPER EX PARTE COMMUNICATION* by First-class United States mail, postage prepaid, upon the following:

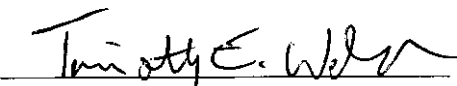
Mark N. Lipp  
Erwin G. Krasnow  
Shook, Hardy and Bacon  
600 14<sup>th</sup> Street, N.W. Suite 800  
Washington, D.C. 20005-2004

Kathy Archer, Vice President  
CapStar Broadcasting Partners  
600 Congress Avenue #1400  
Austin, TX 78701

Joan Reynolds  
Brantley Broadcast Associates  
415 North College Street  
Greenville, AL 36037

James R. Bayes  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Kevin F. Reed  
Dow Lohnes & Albertson PLLC  
1200 New Hampshire Ave., N.W. #800  
Washington, D.C. 20036

  
Timothy E. Welch